Nos. 04-277 & 04-281

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In The
Supreme Court of the United States

NATIONAL CABLE &
TELECOMMUNICATIONS ASSOCIATION, et al.,

Petitioners,

v.

BRAND X INTERNET SERVICES, et al.,

Respondents.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Petitioners,

v.

BRAND X INTERNET SERVICES, et al.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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September 30, 2004

QUESTION PRESENTED

Whether the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, compels the conclusion that cable modem service contains a telecommunications service component within the meaning of § 153(46), as the Ninth Circuit held.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents States and Consumer Groups state the following:

The California Public Utilities Commission, the Vermont Public Service Board, and the Vermont Department of Public Service (States) are governmental entities.

The Consumer Federation of America (CFA) and Consumers Union (CU) (Consumer Groups) do not issue shares to the public and have no parent corporations that issue shares to the public. The Consumer Federation of America is the nation's largest consumer advocacy group, composed of two hundred and eighty state and local affiliates representing consumer, senior citizen, low-income, labor, farm, public power and cooperative organizations, with more than fifty million individual members.

Consumers Union, publishers of *Consumer Reports*, is an independent, nonprofit testing and information organization serving only consumers.

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BRIEF FOR THE STATES AND CONSUMER GROUPS IN OPPOSITION

The People of the State of California and the California Public Utilities Commission, the State of Vermont, the Vermont Public Service Board and the Vermont Department of Public Service, the Consumer Federation of America, and Consumers Union, respectfully oppose the petitions for a writ of certiorari.

PRELIMINARY STATEMENT

This case raises no significant legal question that warrants the Court's review. In *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), the Ninth Circuit correctly held, after a straightforward statutory analysis that courts of appeals routinely perform, that the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (Act or 1996 Act), compels the conclusion that cable modem service includes a common carrier telecommunications service component within the meaning of § 153(46) of the Act.[1] The decision below properly adhered to that precedent. This construction is the only reasonable interpretation of the Act that comports with the statute as a whole. It is also the only one consistent with the Act's twin goals of promoting competition and ensuring that all Americans have affordable access to the high-speed conduits necessary to receive the wide variety of advanced telecommunications and information services that competitors offer.

[1] Relevant provisions are set forth in the attached Statutory Appendix. "Pet. App." refers to the FCC's Appendix accompanying its petition.

There is no substance to the FCC's claim that the Ninth Circuit improperly "settled" "a vastly important aspect of national telecommunications policy." FCC Pet. at 3. The FCC's claim conflates the question of how Congress classified cable modem service under the Act – the issue properly before the Ninth Circuit and this Court – with the question of whether cable modem service should be regulated under the Act – an issue not decided by the Ninth Circuit, and not before this Court either. Far from having "overridden" the FCC, or having otherwise "directly threaten[ed]" or "settled" the national policy of whether cable modem service should be regulated, the Ninth Circuit expressly stated that it was for the FCC to make that call. The court did not at all impinge on the FCC's ability to do so. Instead, the court made clear that under § 160 the FCC could refrain from regulating cable modem service altogether – exactly what the FCC seeks – but only by the means that Congress prescribed. *Portland*, 216 F.3d at 879-80.

Nor is there substance to the FCC's claim that the statute is ambiguous, thus requiring deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to its classification of cable modem service under the Act. But even if the FCC's claim were correct, the FCC would not deserve *Chevron* deference because its interpretation of the Act is simply not reasonable. Its classification of cable modem service as solely an information service not only lacks textual support in the Act, but it renders inapplicable the very provisions of the Act that promote competitive access by any Internet service provider (ISP), and universal access by all Americans, to the high-speed services that connect customers to the Internet.

In practice, the FCC's construction would have enormously adverse consequences for consumers. In California, only one in four customers who have access to high-speed transmission service to connect to an ISP has a choice between digital subscriber line (DSL) service and cable modem service.[2] In Vermont, nearly half of its population with access to broadband service has only one choice – either DSL or cable modem service.[3] For the millions of customers whose only option is cable modem service, the FCC would be powerless to require the same common carrier obligations applicable to DSL service that ensure affordable access to the ISP of the customer's choice. The customers will thus see fewer service choices, enjoy little or no protection against unreasonable rates for accessing an ISP, and if they are disabled or poor, have no guarantee that they will even be able to access the Internet.

In short, the Ninth Circuit's decision is not problematic and raises no significant issues. Further review is not warranted.

STATEMENT OF THE CASE

1. Access to the Internet. The Internet is a collection of computers that store and process information, connected by a network. Internet service providers, as the name suggests, provide access to that network to ordinary

[2] *The Status of Telecommunications Competition in California*, Second Report for the Year 2002, at 32, California Public Utilities Commission.

[3] *Vermont Telecommunications Plan,* September 2004, at 3-10, Vermont Department of Public Service.

consumers, typically also providing consumers with other services, such as an e-mail account. Consumers, in turn, need to have some way of contacting, or connecting to, the ISPs. Hence, the service that ISPs provide generally has two components: an information service component (connecting and processing information to and from the Internet), and a telecommunications component that gives consumers access to the ISP's services.

Initially, ISPs usually were stand-alone enterprises, and customers accessed them via their ordinary, regulated dial-up telephone service provided by the telephone company, separate from the ISP. Although the network that connects all computers that comprise the Internet is relatively high-speed, ordinary telephone service connecting end-use customers to the ISP is very slow, and thus creates a speed bottleneck. Accordingly, as technologies developed, telephone companies introduced a new, faster technology, known as digital subscriber line service, to allow end-users to connect to ISPs. With the advent of DSL service, some telephone companies created their own ISPs, and bundled sales of their DSL service with their ISP services. Later still, cable television operators entered the broadband (*i.e.*, high-speed) market, creating their own ISPs, and used their cable lines, which are functionally similar to DSL lines, to allow users to have a relatively fast connection to ISP services. Today, the "last-mile" high-speed connection which enables a customer to access an ISP is principally controlled either by the telephone company via DSL service or by the cable company via cable modem service.[4] Cable modem service, however,

[4] As the FCC notes, other types of broadband networks are not yet available to residential customers. FCC Pet. at 5.

comprises nearly two-thirds of the broadband market. *See* Industry Analysis & Technology Div., FCC, *High-Speed Services for Internet Access: Status as of December 31, 2003*, at 8, Table 3 (June 2004).

Until the ruling below, the FCC "consistently recognized that Internet access implied the separate provision of a telecommunications service by some entity," even if to itself. Pet. App. 31a (Thomas, J., concurring) (citing *In re Federal-State Joint Bd. on Universal Serv.*, 13 F.C.C.R. 11,501, 11,539-40 (1998) (*Universal Service Report*), & *In re Bell Operating Cos. Joint Petition for Waiver of Computer II Rules*, 10 F.C.C.R. 13,758, 13,767-68 (1995). The FCC further acknowledged that from the customer's perspective, Internet access might look like one service, but under the Act, the FCC classified the two services separately: "the first service is a telecommunications service (*e.g.*, the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access " Pet. App. 32a (Thomas, J., concurring) (quoting *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 F.C.C.R. 24,012, 24,030, ¶ 36 (1998)). The FCC thus classified the DSL transmission component of Internet access as a common carrier "telecommunications service." *Id.* at ¶ 37.

In the ruling below, however, the FCC classified functionally similar cable modem service as solely an information service with no separate telecommunications service component.[5] Thus, unlike most dial-up and many DSL ISPs, "cable-owned or cable-affiliated ISPs . . . essentially

[5] The FCC defines cable modem service to include both the high-speed access to the Internet as well as the applications or functions that can be used with high-speed access. Pet. App. 86a.

own the 'last mile' (*i.e.*, the connection between the headend and the subscriber's home), giving them the power to restrict other ISPs' access to cable subscribers." Pet. App. 5a. Although a cable modem subscriber may bypass the cable ISP's services and "click through" to another ISP, the subscriber is compelled to "pay a monthly 'fee' 'directly' to the cable company in order to use "'telecommunications'" to reach another ISP. *Id.* at 30a-31a (Thomas, J., concurring).

2. The 1996 Act. In recognition of new and evolving transmission technologies to connect customers to new and innovative information services available on the Internet, Congress enacted the 1996 Act "to open all telecommunications markets to competition," Preamble, 110 Stat. 56, including those served by ISPs, so that all Americans could have access to a wide variety of services from numerous providers. To that end, the statute maintained the regulatory requirement that "telecommunications" transmission services continue to be offered on just, reasonable, and nondiscriminatory terms. "Information services" were left largely unregulated.

The Act's distinction between "telecommunications services" and "information services" derives from the distinction between "basic services" and "enhanced services" under what is known as the "Computer II"[6] regulatory framework. *See Universal Service Report*, 13 F.C.C.R. at

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[6] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, Final Decision, 77 F.C.C. 2d 384, 417 (1980), *recon.* 84 F.C.C. 2d 50 (1980), *further recon.*, 88 F.C.C. 2d 512 (1981), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

11,511-14, ¶¶ 21-27. Since 1980, the FCC has fostered vigorous competition in information service markets by mandating a network architecture that gives information service providers nondiscriminatory and reasonable access to basic network transmission services controlled by telecommunications providers. Under this framework, the FCC distinguished between "basic" transmission services and "enhanced" services, like LEXIS, provided over them, regulating the former but not the latter. The FCC required companies that publicly offered basic transmission and enhanced services together to unbundle the transmission service they controlled and offer it on nondiscriminatory terms to competitive providers of enhanced services in accordance with §§ 201 and 202 of Title II. Pet. App. 35a (Thomas, J., concurring).[7]

Computer II's regulatory framework spawned an explosive growth of new and innovative information services introduced by a multitude of new competitive entrants into the information services market. *Universal Service Report*, 13 F.C.C.R. at 11,546, ¶ 95. Telephone companies in turn began to develop and perfect high-speed DSL transmission services to support the delivery to customers of Internet-based information services offered by both the telephone company and competitive ISPs. The ultimate beneficiaries of this regulatory framework have been consumers, with greater access to a wider variety of information services from numerous providers at lower prices.

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[7] The FCC treats companies that merely lease transmission facilities from telephone companies as offering enhanced services only. Pet. App. 39a (Thomas, J., concurring) (citation omitted).

In the 1996 Act, Congress not only maintained the Computer II framework, but expanded upon it by requiring additional network unbundling to increase competitive access to the basic transmission facilities and services of all telecommunications providers. § 251; Pet. App. 35a-36a (Thomas, J., citing *Universal Service Report*, 13 F.C.C.R. at 11,511, ¶ 21) (Act built upon Computer II framework and its definitions). With respect to advanced telecommunications services, in sections 706(a) and 706(c)(1) Congress encouraged both the FCC and the states to continue to use their regulatory tools to spur telecommunications providers to extend transmission services "without regard to any transmission media or technology" to high-cost areas, to low-income and disabled customers, and to schools and libraries, so that all Americans would enjoy access to a wide choice of competitive advanced information services at lower prices. § 254(b)(2), (3), (6); § 255.

In § 160, Congress gave the FCC the additional tool of regulatory forbearance to enable the agency to refrain from regulating services that otherwise fall within its regulatory authority – like the telecommunications service portion of cable modem service – provided specified conditions to ensure consumer protection are satisfied.

Under the Act's framework, the FCC limited its regulation to those companies that provide the underlying transmission service for information services. *See Universal Service Report*, 13 F.C.C.R. at 11,546, ¶ 95. In particular, the FCC required telephone companies that offer DSL transmission integrated with their Internet-based information services to unbundle and offer to competing ISPs nondiscriminatory access on reasonable terms to this "last-mile" connection to their subscribers. *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 F.C.C.R. at 24,030, ¶ 37 (*Advanced Services Order*).

Until the ruling at issue here, the FCC's regulation cohered perfectly with the Act's definitions of "telecommunications," "telecommunications service," and "information service." In § 153(46), a "telecommunications service" is the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." Under § 153(43), "telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." "Information services" are defined under § 153(20) of the Act in pertinent part as services that offer the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." Congress specified in § 153(44), which defines "telecommunications carrier," that a provider offering telecommunications services shall be treated as a common carrier, but "only to the extent that it is engaged in providing telecommunications services." Thus, to the extent that a company provides integrated DSL and ISP services over its own facilities, the FCC regulates only the DSL (transmission) service.

The FCC has stated that the definitions of "telecommunications service" and "information service" are mutually exclusive, and no one disagrees. At the same time, the FCC has made plain that a "telecommunications service" does not lose its character as such when a company combines it with an information service. *Universal Service Report*, 13 F.C.C.R. at 11,530, ¶ 60.

The Act's definitions distinguish services on the basis of function, and not on the type of technology or facilities used to provide them. The definitions thus apply to all

telecommunications and information services regardless of whether broadband or narrowband or some other technology or medium is used, and regardless of whether cable, wireline, or wireless facilities are deployed to enable their provision. § 706(c)(1); § 153(46); H.R. Rep. No. 98-934, at 43, 1984 WL 37495 ("distinction between cable services and other services offered over cable systems is based upon the nature of the service provided, not the technological evaluation of the two-way transmission capabilities of cable systems").

3. *AT&T Corp. v. City of Portland.* Four years ago, consistent with the Act's language, structure, and purpose, as well as the FCC's existing regulatory regime, in *AT&T Corp. v. City of Portland*, the Ninth Circuit determined that Congress intended to classify high-speed access to the Internet via cable lines as a telecommunications transmission service. *Portland*, 216 F.3d at 877-79. The issue arose in a dispute over whether the Act gave the city of Portland authority to condition AT&T's transfer of its cable TV franchise on AT&T's provision to competing ISPs of "open" or nondiscriminatory access to its cable broadband transmission service for Internet access. Pet. App. 12a-13a. The city was concerned that "AT&T might shut out competing ISPs by restricting cable broadband access to its own proprietary ISP." *Id.* at 13a.

"No less than six times in recent years," and at least two years before *Portland*, the question of how Congress intended to classify cable modem service under the Act was before the FCC, but each time the FCC declined to answer it. *Nat'l Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 357 (2002) (Thomas, J., dissenting). The FCC participated as amicus curiae in *Portland*, but again would not address the issue. Pet. App. 18a-19a

("In *Portland*, we took pains to 'note at the outset that the FCC has declined, both in its regulatory capacity and as amicus curiae, to address the issue before us.'")

The answer to the purely statutory question required the court, undertaking a *Chevron* step-one type analysis, to determine independently how cable modem service is classified under the Act. *Portland*, 216 F.3d at 877-79. The court determined that cable modem service did not fit the definition of "cable service." *Id.* at 876-77. However, that determination was not sufficient to address whether the city nevertheless could impose an open access requirement pursuant to § 541(b)(3), which fences off from the city's reach a cable operator's provision of "telecommunications services." Pet. App. 13a. The court thus found it necessary to determine whether the transmission service component of cable modem service is a "telecommunications service." Pet. App. 13a, 16a-17a. The court closely examined the Act's definitions, and how they "cohere[d] with the [Act's] overall structure," history and purpose. *Portland*, 216 F.3d at 877-79. Reading the Act as a whole, the court concluded that cable modem service is in part a telecommunications service. The court said:

> Like other ISPs, [AT&T's cable broadband service] consists of two elements: a "pipeline" (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, [the cable broadband provider] controls all of the transmission facilities between its subscribers and the Internet. To the extent [a cable broadband provider] is a conventional ISP, its activities are that of an information service. However, to the extent that [a cable operator] provides its subscribers Internet transmission over its cable broadband

> facility, it is providing telecommunications service as defined in the Communications Act.

Pet. App. 15a (brackets and parentheses in orig.).

Noting that Congress expressly intended the Act to be technologically neutral, the court also cited the FCC's regulation of DSL service, "a high-speed competitor to cable broadband, as an advanced telecommunications service subject to common carrie gations." *Portland*, 216 F.3d at 879. The FCC itself prev sly said:

> [Bell Operating Companies] offering information to end users of their advanced service offerings, such as xDSL, are under a continuing obligation to offer competing ISPs nondiscriminatory access to the telecommunications services utilized by the BOC information services.

Advanced Services Order, 13 F.C.C.R. at 24,030-31, ¶ 37.

The court further considered the Act's purpose in promoting "vigorous competition" among providers that "prioritizes consumer choice" by mandating a network architecture embodied by the "dual duties of nondiscrimination and interconnection." *Portland*, 216 F.3d at 879. It concluded that the principles of nondiscriminatory access in §§ 201 and 202 necessarily apply to all Internet transmission services. *Id.*

Based on this straightforward analysis, the Ninth Circuit unanimously concluded that the Act compels the conclusion that cable modem service contains a telecommunications service component. Having so concluded, the court held that the city's open access requirement was unlawful because the city sought to regulate telecommunications

services offered by cable operators in violation of § 541(b)(3). *Portland*, 216 F.3d at 880.

The court, however, did not conclude that the FCC was required to regulate the telecommunications service component of cable modem service under Title II. Recognizing the broad authority that Congress gave the FCC in § 160 to forbear from enforcing some or all of the Act's provisions, the court made clear that it was not "imping[ing]" on the FCC's authority over "the details of telecommunications policy," including its authority to forbear from regulating the service altogether. *Portland*, 216 F.3d at 879-80.

No party sought review of *Portland*, and the FCC has never challenged the correctness of that decision.

4. The FCC's Declaratory Ruling. Two years after *Portland*, the FCC finally weighed in on how to classify cable modem service under the Act. The FCC ruled, in agreement with *Portland*, that cable modem service is not a cable service under the Act. However, in direct conflict with *Portland*, and inconsistent with its regulation of DSL service, the FCC declared that cable modem service, when offered to the public for a fee, is solely an information service, and does not contain a telecommunications transmission service component subject to Title II and Computer II. Pet. App. 94a-96a.

Ignoring the fact that the Act requires technological neutrality, and relying on the historical happenstance of the way Internet access service had evolved, the FCC reasoned that Computer II's obligations of nondiscriminatory access to company-controlled transmission services "have been applied exclusively to traditional wireline services and facilities," that the "*telephone network* is the

primary, if not exclusive means" by which ISPs can access their customers, and that the FCC had "never . . . applied Computer II to information services provided over cable facilities." Pet. App. 100a-101a (emphasis in orig.) The FCC thus declared that only facilities-based (*i.e.*, those that own or control transmission facilities) *telephone* companies, but not facilities-based *cable* companies, must provide the transport underlying their information services on a common carrier basis. Pet. App. 101a-102a.

The FCC acknowledged that cable modem service does in fact contain a discrete telecommunications transmission component that is functionally separate from the information services component. Pet. App. 96a-97a. The FCC, however, contended that when a cable operator publicly offers cable modem service for a fee, the telecommunications transmission component ceases to be a legally separate service when bundled with information services. The FCC did not mention that it had repudiated that approach with respect to integrated services offered by telephone companies. *See Universal Service Report*, 13 F.C.C.R. at 11,530, ¶ 60. Instead, it asserted, without identifying any textual support in the statute, that the cable operator must offer its transmission service on a "stand-alone" basis to the end use customer in order for it to be considered a "telecommunications service" under the Act. Pet. App. 96a-97a. At the same time, the FCC admitted that the customer is not compelled to use the bundled services package, and could completely bypass the cable operator's ISP services by "clicking through" and separately utilizing the transmission path to reach another ISP if he paid an additional fee over and above the monthly charge for cable modem service, and thus paid twice for the service. Pet. App. 57a-58a.

The FCC further conceded that some cable operators do separately offer the telecommunications component of cable modem service to unaffiliated ISPs. Pet. App. 109a, 111a. The FCC, however, concluded that this offering is private carriage, and therefore not subject to regulation, although it admitted that "[t]he record does not contain sufficient facts" to support that conclusion. *Id.* at 111a. In the alternative, the FCC waived Computer II requirements otherwise applicable to the offering to avoid "an open access regime." Pet. App. 102a.

Commissioner Copps dissented from the ruling, stating that it was inconceivable "that Congress intended to remove from its statutory framework core communications services" such as cable modem service, or that Congress "envisioned its statutory handiwork being made obsolete by a new service offering." Pet. App. 199a. In particular he criticized the FCC's refusal "with scant analysis" to apply its own rules in Computer II that "ha[ve] been key to the development of a competitive information services market." Pet. App. 200a.

Simultaneous with the issuance of its ruling, the FCC initiated a further proceeding in which, among other things, it is considering whether to forbear under § 160 from regulating the telecommunications service component of cable modem service in light of *Portland's* holding. Pet. App. 151a-152a. The FCC has yet to act, notwithstanding that numerous parties submitted comments to the FCC over two years ago.

5. The Decision Below. In the per curiam opinion below, the Ninth Circuit adhered to its decision in *Portland*, and vacated the FCC's ruling that classified cable modem service as wholly an information service. After discussing in

detail its analysis in *Portland*, and concluding that the "regulatory classification of broadband service [was] an essential element of [its] decision," Pet. App. 16a, the court followed its precedent under two lines of reasoning. First, it cited the law of its circuit that binds a three-judge panel to the court's precedent unless the precedent constituted deferential review of agency decisionmaking, and the agency's later conflicting construction is permissible. Pet. App. 17a-19a (citing *Mesa Verde Construction Co. v. Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124 (9th Cir. 1988) (*en banc*)). The court concluded that *Mesa Verde's* requirements for ignoring precedent were not met because *Portland* involved no potential deference to the agency's statutory construction, and "we never said the relevant provisions of the Act were ambiguous." Pet. App. 18a-19a.

Second, the court applied *Neal v. United States*, 516 U.S. 284 (1996), which holds that *Chevron* deference does not apply to an agency's statutory construction that postdates and conflicts with a court's independent judicial construction. Pet. App. 19a-20a.

Judges O'Scannlain and Thomas filed concurring opinions. Judge O'Scannlain expressed uneasiness that stare decisis bound the panel to its precedent, although he noted that an en banc panel could overrule the court's prior decisions. Pet. App. 23a. Judge Thomas, who authored the *Portland* decision, concluded that "*Chevron* deference would have been inappropriate even if the agency had interpreted the statute prior to *City of Portland*." Pet. App. 27a. Analyzing "the full statutory definition, the overall legislative scheme, and the associated regulatory history," *id.* at 30a, he stated that "[n]othing" in the Act "suggests that the telecommunications component must be priced or offered separately in order to qualify as

a telecommunications service," contrary to the FCC's rationale. *Id.* at 31a. In particular, he cited the FCC's concession that cable modem subscribers may "bypass" the cable company's ISP services and "click through to another [ISP] service," but nevertheless "pay a monthly 'fee' 'directly' to the cable company in order to use 'telecommunications.'" *Id.* at 30a-31a. He further noted that "the FCC consistently recognized that Internet access implied the separate provision of a telecommunications service by some entity," both "in the conventional world of dial-up access over 'plain old telephone service,'" and "when the FCC first applied the 1996 law to integrated broadband services." *Id.* at 31a. He discussed how the "evolution of advanced telecommunications regulation prior to the 1996 Act" under the FCC's Computer II framework "reflect[ed] the same underlying belief [as the 1996 Act] that widespread access to 'basic' transmission facilities would spur competition in 'enhanced services' and provide consumers with a wider variety of more closely tailored products." *Id.* at 35a. While acknowledging that information services and telecommunications services are mutually exclusive, Judge Thomas stated that "nothing suggests that telecommunications service ceased to be so when offered to the public along with an information service." *Id.* at 37a.

The FCC and the cable association thereafter sought rehearing en banc before the Ninth Circuit. The court, however, chose not to revisit *Portland*, and declined to grant en banc review, with no active judge on the Ninth Circuit requesting a vote on whether to rehear the case en banc. Pet. App. 207a. These petitions for certiorari followed.

REASONS FOR DENYING THE PETITIONS

None of the reasons given by the FCC warrants review by this Court. The Ninth Circuit's interpretation of the Act as compelling the conclusion that cable modem service contains a separate telecommunications service is the only one consistent with the Act as a whole, and the only one consistent with the Act's purpose to promote competitive and universal access to high-speed transmission services to enable all Americans to connect to the Internet and to the ISP of their choice. In contrast, the FCC's interpretation is inconsistent with the Act as a whole, and would thwart the Act's central objective by rendering inapplicable the very provisions of the Act designed to promote such access.

Contrary to the FCC's claim, the Ninth Circuit's decision does not in any way require the FCC to regulate cable modem service or otherwise "settle" the question of whether cable modem service should be regulated. The Ninth Circuit explicitly recognized, and did not impinge upon, the broad authority that Congress gave the FCC under § 160 to forbear from enforcing any provision of the Act once the FCC makes the findings that Congress specified. The FCC is not free to circumvent § 160 just because it thinks the procedure may be burdensome.

The Ninth Circuit also correctly applied *Neal* in adhering to its precedent in *Portland* and declining to accord *Chevron* deference to the FCC's statutory interpretation. There is no circuit conflict that is relevant here, and even if in *Portland* the Ninth Circuit had found the statute to be unclear, *Chevron* deference would not have been proper because the FCC's construction is manifestly unreasonable.

The petitions for a writ of certiorari should therefore be denied.

I. THE ACT COMPELS THE CONCLUSION THAT CABLE MODEM SERVICE CONTAINS A TELECOMMUNICATIONS SERVICE COMPONENT, AS THE NINTH CIRCUIT HELD, AND THAT CONCLUSION RAISES NO ISSUE OF NATIONAL IMPORTANCE

1. The Ninth Circuit's decision presents no significant question regarding the interpretation of the statute. Read as a whole, and in light of its legislative history and purpose, the Ninth Circuit correctly concluded that the Act is susceptible only to one reasonable interpretation – that cable modem service is partly telecommunications service and partly information services. The court "did not discern any ambiguity in the statutory meaning for the agency to interpret," and thus "*Chevron* deference would have been inappropriate even if the agency had interpreted the statute prior to *City of Portland*." Pet. App. 27a (Thomas, J., concurring).

The FCC ignores the fact that "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). That said, the FCC's claim of ambiguity is belied by the very statutory definitions upon which it principally relies. In § 153(20), an "information service" is defined as the "offering of a capability for . . . making available information via telecommunications." "Telecommunications" in turn is defined in § 153(43) as "the transmission . . . of information of the user's choosing," "between or among point specified by the user," "without change in the [information's] form and content." When "telecommunications" is "offer[ed] for a fee directly to the public or to such

classes of users as to be effectively available directly to the public," it is a "telecommunications service" "regardless of the facilities used." § 153(46).

A straightforward application of these definitions demonstrates that a cable operator's offering of cable modem service is partly a telecommunications service and partly information services. The cable operator generally advertises its cable modem service directly to the public. And like the telephone company that offers functionally similar DSL service with its Internet-based information services, the cable operator charges a fee for the high-speed transmission link between the customer and the Internet, and for the Internet-based information services that the cable operator's ISP provides over it. Nothing in the Act suggests that because the cable operator chooses to charge a single fee for the two services, that fact transforms the two services into one. Pet. App. 31a (Thomas, J., concurring).

The FCC has conceded that there is a separate "telecommunications" component to cable modem service, but has never adequately explained why, when that component is offered for a fee to the public, it is not a "telecommunications service" as defined in § 153(46). The FCC's only response is that because the "telecommunications" component is not offered on a stand-alone basis, it cannot be a "telecommunications service." Pet. App. 97a. The FCC points to no textual support in the Act to support its theory, nor is there any. The FCC, of course, is not free to insert words into a statute that Congress did not supply. *United States v. Calamaro*, 354 U.S. 351, 359 (1957).

Nor is there any ambiguity in the phrase "via telecommunications" within § 153(20) that supports the FCC's

claim that a cable operator merely "uses" telecommunications but does not offer it for a fee to the public when selling its cable modem service. Pet. App. 97a-98a.[8] The inclusion of that phrase in § 153(20) simply defines "information services" as those that require "telecommunications" or transmission over the electromagnetic medium for their delivery, as distinguished from information services that use other media and are beyond the scope of the Communications Act. *See* H.R. Rep. No. 104-204, at 125-26, 1995 WL 442504 (July 24, 1995) (confirming the term "telecommunications" relates to the type of transmission medium underlying the provision of information services.) For example, absent the "via telecommunications" clause in the statute, a legal research service that stores, retrieves, organizes and provides to customers binders containing the legislative histories of specific statutes would qualify as an "information service" because it is a service "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information." § 153(20). Similarly, absent the "via telecommunications" clause, all public library services would fall within the ambit of § 153(20).

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[8] In its *Universal Service Report,* the FCC stated that an ISP's mere transmission of unaltered data does not imply than an information service contains a telecommunications service component. However, the ISPs referred to "typically, own no telecommunications facilities. Rather, in order to provide those components of Internet access services that involve information transport, they lease lines, and otherwise acquire telecommunications, from telecommunications providers." 13 F.C.C.R. at 11,540, ¶ 81. In other words, as Judge Thomas noted, "*someone* still has to provide telecommunications service. . . . In the integrated cable modem context, the same company provides these two, entirely separate services." Pet. App. 38a (emphasis in orig.).

Obviously, these services are not subject to the Communications Act.

The Act's legislative history further indicates, as Judge Thomas noted, that "'telecommunications service' was distinguished from 'telecommunications' largely in order to exclude internal, privately provided telecommunications networks." Pet. App. 36a (discussing H.R. Rep. No. 104-204, at 126, 1995 WL 442504) (the term "telecommunications service" "recognizes the distinction between common carrier offerings that are provided indifferently to the public or to such classes of users as to be effectively available to a substantial portion of the public, and private services").

The definition of "telecommunications carrier" as "any provider of telecommunications services" in § 153(44) also confirms Congress' understanding that companies may simultaneously offer both telecommunications services and information services, by specifying that Title II's requirements apply "only to the extent that [the provider] is engaged in providing telecommunications services." Pet. App. 32a-33a.

Other provisions of the Act buttress the Ninth Circuit's statutory interpretation. In § 706(a), Congress instructed the FCC and state commissions "*with regulatory jurisdiction over telecommunications services*" to use their regulatory powers in order to encourage the deployment of "advanced telecommunications capability." And "advanced telecommunications capability" includes cable broadband transmission, as the FCC concedes. FCC Pet. at 3. As Judge Thomas noted, these regulatory powers have "traditionally been applied to basic transmission services rather than enhanced information services." Pet.

App. 33a; *see also* S. Rep. No. 104-23, at 51, 1995 WL 142161 (Mar. 30, 1995) ("the bill encourages States and the FCC to utilize *regulatory* incentives . . . as a means to promote the deployment of broadband capability") (emphasis added). It is not a sensible reading of the statute to conclude that in one provision Congress would direct agencies to use their regulatory authority to promote the deployment of broadband technologies, and in another provision exempt from regulation an entire class of broadband transmission services.

In short, there is no ambiguity in the Act's definitions on how Congress intended to classify cable modem service. That service contains a separate telecommunications service component, as the Ninth Circuit correctly held.

2. Not only did the Ninth Circuit correctly classify cable modem service under the Act, but that is the only reasonable interpretation of the Act. The FCC's construction is not. Thus, even if the statute were susceptible to more than one reasonable interpretation, the FCC's would not deserve deference under *Chevron* step-two.

The FCC chiefly argues that its classification of cable modem service is consistent with the Act because cable operators generally choose to sell the transmission component of that service bundled with the information service component, rather than as a stand-alone service. Pet. App. at 97a.[9] Because of that bundling, the FCC asserts that its

[9] Contrary to Verizon's post hoc claim (Verizon Br. at 27), the FCC's ruling exempting cable operators from Title II obligations was not based on a finding that they lacked market power in the broadband market. The FCC's ruling exempts cable operators from Title II, even if they hold monopoly power in a given market, because they bundle broadband transmission with

(Continued on following page)

Computer II obligations are inapplicable to cable modem service, and in any event they would apply only to telephone companies and service provided over wireline, not cable, facilities. *Id.* at 100a. The FCC's arguments are seriously flawed for at least two reasons.

First, Computer II, which embodies the nondiscrimination principles of the Act, is based precisely on the fact that telephone companies otherwise would choose not to make a stand-alone offering of transmission service if they could escape Title II regulation merely by bundling transmission with their own information services. The FCC previously understood this as well when, subsequent to the Act's adoption, it told Congress that a telephone company could not avoid its common carrier obligations simply by packaging its transmission service with information services for sale to the public. *See Universal Service Report*, 13 F.C.C.R. at 11,530, ¶ 60.

Second, the FCC's argument that Computer II applies "exclusively to traditional wireline services and facilities" and that the FCC has "never . . . applied Computer II to information services provided over cable facilities" relies on a distinction based on transmission "facilities" or "technology" that Congress expressly proscribed. §§ 153(46) & 706(c)(1); Pet. App. 100a-102a. In any event, the fact that telephone companies differ because they may also offer access to the Internet separately from their Internet-based

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information services. However, even if the FCC had found an absence of market power, ignoring the fact that cable holds nearly a two-thirds share of the residential broadband market, the FCC would have been obliged to comply with the regulatory forbearance requirements in § 160 if it wished to exempt cable operators from Title II.

information services derives from an historical anomaly, not any evidence of congressional intent. Indeed, as Judge Thomas discusses, the history that is relevant is the "evolution of advanced telecommunications regulation prior to the 1996 Act [that] reflects the same underlying belief that widespread access to 'basic' transmission facilities would spur competition in 'enhanced services' and provide consumers with a wider variety of more closely tailored products." Pet. App. 35a (citation omitted). He correctly concluded that applying Computer II's framework to cable modem service "would enhance independent ISP access to telecommunications facilities, almost certainly increasing consumer choice." Pet. App. 34a.

The FCC nevertheless asserts that transmission is "part and parcel" of cable modem service but that assertion is belied by the FCC itself. Pet. App. 96a. It concedes that cable modem subscribers are able to completely "bypass that company's web browser, proprietary content, and e-mail" and "'click through' to another service" for an additional fee. *Id.* at 30a-31a (Thomas, J., concurring). The FCC further concedes that some cable operators actually do offer transmission on a stand-alone basis to unaffiliated ISPs. *Id.* at 111a.

In addition, the FCC's statutory interpretation is wholly inconsistent with § 706(a) of the Act. If cable modem service does not contain a telecommunications service component, as the FCC contends, then Congress' directive to the FCC to promote ubiquitous access to "advanced telecommunications capability" by "regulating methods" relates to nothing. The FCC renders this language superfluous. *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (court must give effect to every clause and word of statute).

Finally, the FCC's statutory construction subverts congressional intent by rendering inapplicable to cable modem service all of the Act's provisions that promote competitive and universal access to broadband capability. Most significantly, because much of Title II applies only to providers of telecommunications services, the FCC's interpretation would allow potentially any broadband provider to evade Title II's requirements and all of the consumer protections attendant to it by simply bundling its transmission offering with information services. Specifically, as the FCC concedes, these providers would not be required to comply with the traditional obligations of common carriage that ensure affordable and reliable access to the Internet by low-income, disabled and rural customers, or by school children and public libraries. §§ 254(b)(2), (3), (6); 255. Nor would providers be required to offer to their competitors nondiscriminatory access to broadband services so that customers have a choice of Internet-based services from numerous providers at lower prices. §§ 201 & 202; FCC Pet. at 25. It is inconceivable that Congress meant to categorically exempt cable operators, who control nearly two-thirds of the residential and small business broadband market, from these obligations.

The FCC nevertheless complains that the Ninth Circuit's decision places the agency "on the horns of a dilemma." FCC Pet. at 27. But it is the FCC that places itself there by classifying cable modem service differently from DSL service, and on a basis that Congress proscribed. By the statutory construction it seeks to impose, it is the FCC, and not the Ninth Circuit, that thwarts the implementation of the Act by abrogating the principles of nondiscrimination and interconnectivity underlying the Act so that "broadband services [are] made available to 'all

regions of the Nation.'" FCC Pet. at 3 (quoting 47 U.S.C. § 254(b)(2)).

In short, the FCC's statutory construction "strays far afield from the regulatory construct established by Congress." Pet. App. 198a (Comm. Copps dissenting). It is not a permissible interpretation of the Act triggering *Chevron* deference.

3. The Ninth Circuit's decision does not, contrary to the FCC's dire claim, create "immediate and urgent difficulties in the communications industry that warrant intervention by this Court" by tying the FCC's regulatory hands. FCC Pet. 24. The FCC itself acknowledges, and the Ninth Circuit expressly recognized, that the FCC is not compelled to regulate cable modem service, or any broadband transmission service, if it makes the requisite findings for regulatory forbearance that Congress specified in § 160. Congress specifically cited that option in § 706(a), and the Ninth Circuit properly left to the FCC the national policy decision of whether to regulate the service in whole, in part, or not at all. *See Portland*, 216 F.3d at 879-80.

The FCC complains that regulatory forbearance is "not an adequate substitute" for classifying cable modem service in the way that it did, because that procedure is too burdensome. FCC Br. at 27. The short answer is that the FCC's complaint must be made to Congress, not this Court, because regulatory forbearance is the procedure dictated by Congress if the FCC does not want to enforce any of Title II's provisions. The FCC is not free to circumvent it by rewriting the Act.

II. THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER COURT OF APPEALS

Petitioners' claim that the Ninth Circuit erred in relying on *Neal*, and that the Court should grant review to clarify or limit the scope of *Neal* is, at best, just a distraction. Contrary to their assertion, there is no confusion – and no circuit split – concerning *Neal's* application or scope. According to petitioners, courts are confused whether *Neal* applies only in cases where the statute at issue is unambiguous, or whether *Neal* requires courts to apply stare decisis regardless of the statute's ambiguity. But this simply is not true. The few courts to have considered *Neal* have applied it consistently with the way the Ninth Circuit did here. *See Bankers Trust U.S. Corp. v. United States,* 225 F.3d 1368 (Fed. Cir. 2000); *Aguirre v. INS*, 79 F.3d 315, 317 (2d Cir. 1996) (court not compelled to defer to agency). The CPUC is aware of, and petitioners cite, no circuit court decision that has considered *Neal* and opined that stare decisis is appropriate only when the court's earlier decision interpreted an unambiguous statute.[10]

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[10] Most of the cited cases pre-date *Neal*, and hence are irrelevant. Those that post-date *Neal* all are distinguishable. In *Reich v. D.M. Sabia Co.*, 90 F.3d 854, 858 (3d Cir. 1996), the Third Circuit held that it was not bound by its prior interpretation of a statute because, *inter alia,* the statute had been amended since the court's earlier decision. *Heimmermann v. First Union Mort. Corp.*, 305 F.3d 1257, 1263 (11th Cir. 2002), neither cites nor discusses *Neal*. And *Aguirre v. INS*, 79 F.3d 315, 317 (2d Cir. 1996), actually holds, like the Ninth Circuit, that once a court has construed a statute prior to an agency having interpreted it itself, the agency is not free to adopt a contrary interpretation.

In any event, even if the scope of *Neal* were unclear, or even if the Court might want to revisit the issues decided in *Neal*, this is not an appropriate case in which to do that. As the Court has repeatedly admonished, "this Court reviews judgments, not opinions." *Chevron*, 467 U.S. at 842. Accordingly, the fundamental issue here is not the Ninth Circuit's reliance on *Neal*, but whether the Ninth Circuit's judgment was correct that the telecommunications portion of cable modem service is a "telecommunications service" within the meaning of the Act. As detailed above, the Act, read as a whole and in light of its legislative history and purpose, is susceptible to only one reasonable answer to this question: the one announced by the Ninth Circuit in *Portland*, and reaffirmed in the decision below. Thus, even if there were a question whether *Neal* requires or permits a court to defer to an agency's interpretation of a statute after an earlier court already has construed the statute, that question is irrelevant here. Because the statute is susceptible to only one reasonable interpretation, the question of *Chevron* deference, and whether *Neal* leaves any room for it, simply is not presented in this case. There is no need, or even context, in this case to consider the relationship between *Neal* and *Chevron* deference, as the petitioners ask the Court to do.

Moreover, even if the statute were ambiguous, as the FCC contends, there still would be no reason to consider *Neal*'s relationship to *Chevron* in this case. Regardless of *Neal*'s scope, a court must afford *Chevron* deference to an agency's interpretation of a statute only if the agency's interpretation of the statute is reasonable. *See Chevron*, 467 U.S. at 844. Here, as explained above, the FCC's interpretation is manifestly *not* reasonable.

CONCLUSION

For the reasons stated, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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STATUTORY APPENDIX

47 U.S.C. § 153 Definitions

(20) Information service

The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

(43) Telecommunications

The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

(44) Telecommunications carrier

The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

(46) Telecommunications service

The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

Advanced Telecommunications Incentives

Section 706 – Pub.L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, as amended Pub.L. 107-110, § 1076(gg), Jan. 8, 2002, 115 Stat. 2093 (uncodified, but reproduced at note to 47 U.S.C. § 157) provided that:

(a) In general. – The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

(b) Inquiry. – The Commission shall, within 30 months after the date of enactment of this Act [Feb. 8, 1996], and regularly thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In

the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

(c) Definitions. – For purposes of this subsection:

(1) Advanced telecommunications capability. – The term 'advanced telecommunications capability' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

(2) Elementary and secondary schools. – The term 'elementary and secondary schools' means elementary and secondary schools, as defined in section 9101 of the Elementary and Secondary Education Act of 1965 [20 U.S.C. § 7801].

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47 U.S.C. § 160 Competition in provision of telecommunications service

(a) Regulatory flexibility

Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in

any or some of its or their geographic markets, if the Commission determines that –

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) Competitive effect to be weighed

In making the determination under subsection (a)(3) of this section, the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

. . . .

47 U.S.C. § 201 Services and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefore; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful:

. . . .

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47 U.S.C. § 202 Discrimination and preferences

(a) Charges, services, etc.

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classification, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

. . . .

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47 U.S.C. § 254 Universal Service

(b) Universal service principles

The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

. . . .

(2) Access to advanced services

Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) Access in rural and high cost areas

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(4) Equitable and nondiscriminatory contributions

All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

. . . .

(6) Access to advanced telecommunications services for schools, health care, and libraries

Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h) of this section.

. . . .

(h) Telecommunications services for certain providers

. . . .

(2) Advanced services

The Commission shall establish competitively neutral rules –

(A) to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries; . . .

. . . .